72-16
FILED
JUN 11 1973

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72- 72-1667

RICHARD I. KRODEL,
Petitioner,

v.

JOHN J. HOUGHTALING ET AL,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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June 11, 1973

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

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OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 1-3) is not cited.

JURISDICTION

The judgment of the Court of Appeals (Pet. App. 1-3) was entered on October 26, 1972, and that Court's order denying rehearing (Pet. App. 4) was issued on January 12, 1973. The jurisdiction of this Court is invoked under 28 USC Section 1254(1).

QUESTIONS PRESENTED

I. Did the Court of Appeals correctly hold that the district court's denial of petitioner's demand for jury trial was a proper exercise of judicial discretion under Rule 39 of the Federal Rules of Civil Procedure, namely, that disbarment proceedings against his attorney are not excusable neglect even though petitioner had instructed his attorney in writing to demand trial by jury and petitioner had promptly notified the district court on discovery that he was without legal representation nine weeks after respondent's answer to pleadings was filed, twenty-three months after case was initiated, and fifteen months before trial was held?

II. Does the district court's action in denying petitioner's demand for jury trial, in error, raise by collateral attack a presumption of substantial injustice in an earlier case by virtue of the court's reliance on it?

III. Does a franchisee's investment in franchisor's business convert his contract to a contract coupled with an interest and thus subject the contract and the contractual relationship with the franchisor to the intervention of equity?

IV. May the petitioner have the leave of this Court to merge a case on retrial by jury with an earlier case to which it is related and amend his pleading in the earlier case to state a new and precedential issue of fiduciary relationship running from the respondent franchisor to the petitioner franchisee, provided that petitioner seeks no award of damages from retrial of the earlier case?

V. Do respondent's acts of retribution for petitioner's commencement of legal proceedings, conducted while an earlier case was pending before the same federal court, causing damages for which a second case was initiated, nullify respondent's immunity from favorable award to petitioner on retrial of the earlier case?

VI. Does petitioner's lack of adequate legal representation, *in toto*, constitute denial of due process?

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V:

> "No person shall be held to answer for a capital, or other infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

Amendment VII:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

STATEMENT

Petitioner, Richard I. Krodel, hereafter referred to as Krodel, has appealed the decision by the Fourth Circuit Court of Appeals (Pet. App. 1-3) affirming a lower court decision which was favorable to respondents, John J. Houghtaling et al, hereafter referred to as Houghtaling, on dismissal by the U.S. District Court for the Eastern District of Virginia for petitioner's failure as plaintiff below to prosecute. (Pet. App. 5). The district court had

earlier denied petitioner as plaintiff below his motion for trial by jury. (Pet. App. 7-19). On March 15, 1973, by Order No. A-937, the Supreme Court of the United States extended time for filing of petition for writ of certiorari to and including June 11, 1973. (Pet. App. 15).

Petitioner as plaintiff below filed his complaint in this case, hereafter referred to as CA 4909A, on July 31, 1968, (Pet. App. 16-17), which was one day before trial was commenced on another case initiated by Krodel on September 7, 1966, hereafter referred to as CA 4207. (Pet. App. 18-20). (The earlier case alleged fraud in the inducement of contract.) In each case, petitioner as plaintiff below alleged his jurisdiction as founded upon diversity of citizenship and the amount of controversy exclusive of interest and costs exceeding $10,000.

> [Both cases involve a franchise relationship based on Houghtaling's vending meter which, upon insertion of a coin, activates a vibrator. The vibrator, which is installed in the box springs of beds in hotels and motels, in turn gives the traveler a gentle massaging effect which is advertised to help him relax. The franchisee, in this case Krodel, contracts with hotel and motel "locations" to install and maintain the meter and vibrator and to make collections, usually monthly, with 75% of the monies collected being retained by the franchisee and 25% by the "location".]

CA 4904A alleged malicious interference by Houghtaling's agent, beginning after March of 1967, with Krodel's contractual relationship with the Hospitality House, Arlington, Virginia, causing loss of contract by September of 1967. This action followed Houghtaling's registered letter of February 28, 1967, which purported to terminate Krodel's franchise agreement. Krodel received the letter on March 2, 1967, and thus short of the thirty days' notice required by the agreement. Houghtaling's explanation, on deposition, supported by depositions of Griffith

and Donal Hill, establishes that the terminology was subject to arbitrary interpretation and application.

Although on contingency agreement, Krodel's attorney stipulated a $750 retainer fee which Krodel, forced in part by loss of expected income from the Hospitality House collections, had to pay by installments not agreeable to the attorney. The attorney then arranged for his own withdrawal and the simultaneous substitution of another attorney on October 20, 1967, who tried CA 4207 on August 1, 1968, without jury. At the trial of CA 4207, Houghtaling's attorney objected to service of process on his client for CA 4909A. The judge stated that he would not consider the objection unless stated by motion. The judge's decision on CA 4207 was adverse to Krodel. (Pet. App. 24).

On November 1, 1968, Krodel's attorney requested permission to withdraw from both cases. Krodel agreed, after having earlier written the attorney instructions to demand trial by jury on CA 4909A. By letter of December 9, 1968, Krodel asked the judge to continue the hearing on his motion for retrial of CA 4207, which was scheduled for December 19, 1968. Krodel's letter stated need for time to find another attorney to represent him. The judge refused but deferred the time to late that afternoon. Appearing at the hearing pro se, Krodel stated, *inter alia*, bias on the part of the judge, who acknowledged the possibility.

The court delayed action twice on own motion on CA 4909A, pending Krodel's appeal of CA 4207. On July 28, 1969, new counsel entered appearance on the two cases and, on the same date, moved for a new trial on CA 4207 on the ground of newly discovered evidence, namely, discovery of Assurance of Voluntary Compliance No. 1666 issued by the Federal Trade Commission on May 20, 1969, (Pet. App. 21-23) and ordering Houghtaling "to cease and desist" from stated representations, supporting Krodel's allegations of fraud and deceit.

At a hearing on October 3, 1969, the judge rejected Krodel's motion for a new trial on CA 4207, giving the reason that that case was on appeal. The court accepted Houghtaling's motion to quash service of process on CA 4909A as defective because served on him while attending trial on CA 4207. The judge suggested service by federal marshal on Houghtaling in Miami, Florida, (where Houghtaling had moved from previous addresses in New Jersey and on Long Island) within fifteen days. Execution of service was filed on October 28, 1969.

On April 3, 1970, the judge again ruled that service on CA 4909A was defective because served by federal marshal, and gave Krodel thirty days to effect new service. The judge suggested service under the "long-arm statute" of the State of Virginia. The Virginia Secretary of State filed return on service of process on April 30, 1970, and the U.S. Marshal, on May 5, 1970. Houghtaling filed a motion to quash and his answer to the pleading on CA 4909A, both on May 18, 1970.

On April 6, 1970, the Court of Appeals held a hearing on CA 4207. (One issue of Krodel's brief was bias by the trial judge.) On that occasion, Krodel's attorney was not prepared to argue the case and his remarks were incoherent, causing the judges to comment on the needless repetition of statements in the brief. By decision of June 2, 1970, the Court of Appeals affirmed the court's decision ". . . on the ground that Krodel had failed to carry his burden of proof of the alleged fraud and deceit." (Pet. App. 25-26)

During this period and unknown to Krodel, disbarment proceedings had been begun against his attorney. On July 16, 1970, Krodel received a telephone call from an Alexandria, Virginia, attorney, unknown to him, who informed Krodel that his attorney had had a nervous

breakdown and that he, the caller, had been asked by the attorney's wife to take over the two cases. By letter, Krodel advised the Court of Appeals the circumstances on July 17, 1970, and the District Court, on July 24, 1970. His letter to the district court stated "Also, I repeatedly asked Mr. Smith to move for a jury trial in this case. Has he done this? If not, will you let me know the procedure for doing this, also."

There was no reply to this or a letter of March 10, 1971, similarly expressing intent to move for jury trial.

In early August of 1970, Krodel paid a substantial retainer to a new attorney with offices in the District of Columbia, to whom he had been referred by a former counsel to a Senate Judiciary subcommittee. The attorney failed to act on either case. Time for appeal on CA 4207 ran out on August 30, 1970. At a pre-trial conference on CA 4909A on October 27, 1970, Krodel related efforts to obtain an attorney, to the judge's apparent satisfaction. With the passage of time, Krodel became alarmed and importuned the attorney to act. By January of 1971, Krodel discovered that the attorney had not entered his name as Krodel's representative. Krodel wrote him several letters and telephoned incessantly to demand withdrawal, which the attorney agreed to in March of 1971.

Meanwhile Krodel searched for another attorney and at a pre-trial conference in the judge's chambers on March 5, 1970, assured the judge that a Virginia attorney known to the judge would represent him. On June 9, 1971, the new attorney entered the case and filed a motion for jury trial. At the hearing of August 13, 1971, the judge dismissed the motion for being ". . . way too late." (Pet. App. 12) At the same time he promised to assign the case for trial to another judge.

On October 19, 1971, trial was held on CA 4909A by the same judge and the judge dismissed Krodel's motions

(a) to continue because he and his attorney were not prepared for trial for reasons given and (b) to permit his counsel to withdraw, as another attorney was insisting on this before he would agree to represent Krodel on both CA 4909A and another case to be commenced in the U.S. District Court of Maryland (CA 72-1104-HM, filed *pro se* on October 31, 1972), where Krodel's attorney was not a member of the bar. The judge dismissed the case for Krodel's failure to prosecute.

At the hearing on his motion for a new trial on CA 4909A, appearing *pro se* on December 10, 1971, Krodel alleged new evidence but refused to reveal the evidence because, he said, he had learned from one witness that the judge had questioned the witness at the Washington Golf and Country Club on the evening of Saturday, October 23, 1971. The judge replied "I never questioned one of your witnesses in my life." (Pet. App. 27).

Responding to the informal procedure afforded him by the Court of Appeals, Krodel appealed the adverse decision on CA 4909A by submitting two letters (April 6 and May 30, 1972) and, after receipt of the Appeals Court's decision on October 26, 1972, sustaining the district court, by another letter (November 14, 1972). These letters make clear the incapacity of his attorney and the disbarment proceedings which deprived Krodel of counsel during the period when demand for trial by jury would have been timely. To his letter of April 6, 1972, were attached affidavits by himself and a third party supporting Krodel's allegation as to the trial judge's inquiry outside the court of a witness to CA 4909A. The Court of Appeals denied Krodel's petition for rehearing on January 12, 1973. (Pet. App. 4)

During research for the brief on appeal to the Supreme Court, Krodel discovered the added requirement for submission of a further affidavit by his last counsel of record, with all affidavits to be submitted to the district

court judge so that he may answer to same. However, since CA 4909A is in the Supreme Court, Krodel is unable to meet this requirement. Should this Court hear the case, it is possible that the last attorney of record will agree to represent him and be available for direct questioning on this point.

PRO SE STATEMENT

Since I am not an attorney and thus not sure of my words, I am submitting this statement in layman's language, realizing that much of it may be treated as self-serving. Although advised to do so, I have elected not to proceed *in forma pauperis.*

Most of the law I know has come from experience with these two cases, and, with specific reference to this brief, mostly since January of this year (1973). I also conducted a nationwide inquiry for legal aid by telephone and letter of law schools, bar associations, and legal authorities on franchising. The results of my inquiry were fruitless. The number of attorneys whom I have contacted since 1966 exceeds 70. I have nevertheless obtained a tentative understanding with my last counsel of record that she will consider representing me should this Court grant my petition for writ of certiorari. I have saved my limited personal funds for this purpose.

The immediate issue here is the Seventh Amendment to the Constitution. Our constitutional forebears apparently gave more unqualified support to this one amendment than to any other of the first ten, including the Sixth Amendment, according to E. Dumbould, *The Bill of Rights* (1957), pp. 160-65.

Although at various times I searched for legal advice from every attorney I contacted and related that advice to the attorney handling my case at the moment, once and only once did I interfere and that was on a point

of fact being covered by deposition. I have paid all fees, nearly all on demand. I have spent countless hours on investigation and, despite the necessity of working on three jobs, even aided my attorney in writing the brief on appeal to the Court of Appeals.

Of the three attorneys who successively represented me on CA 4207, the first two withdrew on discovering that I was as financially impoverished as I had represented myself to be, partly because my search for reemployment was unsuccessful until December 2, 1968, and also because the franchisor engaged in acts of retribution for which I instituted only one lawsuit (CA 4909A). None of the first three attorneys discussed the constitutional right to trial by jury with me. Nor did the judge. Disturbed by the adverse comments of local Virginia attorneys on the trial judge's tendency to "prosecute" a case, I mentioned demand for trial by jury to the third attorney but he dismissed it out of hand.

I appealed the adverse decision on CA 4207, but it took seven months until July 28, 1969, to get another attorney to represent me. (At the August 13, 1971, hearing on the motion for retrial of CA 4909A, the judge in error stated that I had not been represented despite his frequent advice to me to retain counsel. However, entry of attorney was made on the docket for CA 4207, showing pre-trial conferences at which the attorney, and I with him, had appeared on October 3, 1969; January 10, 1970; and April 3, 1970.)

A summation of CA 4207 is essential to understanding CA 4909A.

I became a franchised Magic Fingers dealer on June 10, 1965, with a unilateral verbal option, never confirmed by the company, to withdraw from the company's standarized franchise agreement within thirty days of that date. (Pet. App. 28-33) The agreement designated me

"Magic Fingers of MARVA." An example of my naivete at that time is the advertising and sales campaign which I developed and fully revealed to the company, in which I duplicated at personal expense the company's prepaid post card with its "logo" and return address on the card, merely overprinted with the word "marva" to identify it as in response to my campaign. My purpose was to impress company executives with my devotion to their product. I received not one referral of reply, despite anxious telephone calls and letters to the company. This zero result is contrary to the experience of the advertising industry, as one company official (Donal Hill) stated on deposition, and to my own previous experience with responses to solicitations by mail.

I discovered the existence of Magic Fingers of Hyattsville in early September of 1965. This was contrary to the information which Houghtaling's agent gave me on May 14, 1965, that there was only one dealer in this area: Magic Fingers of Winchester, hereafter referred to as Griffith. My beginning alarm was deepened by discovery that Griffith was disreputable and that instances of his conduct were known to Houghtaling, as later confirmed by deposition of Donal Hill. Griffith also acted as company agent under direct instruction of Houghtaling, also confirmed by deposition of Griffith himself.

General information on abuses in franchising given me by staff personnel on the Senate Judiciary Subcommittee investigating franchising, the referral to a former "investor" whose attorney related to me his misadventures with Houghtaling and the local out-of-court settlement he had obtained for his client (D.C. General Sessions 16364, 1964), and communication with other dealers outside this area confirmed my fear that I should expect retaliation if I commenced a lawsuit. One dealer even related that Houghtaling personally had made the threat to "bleed you white" for stating his intent to commence a lawsuit against Magic Fingers.

Several attorneys cautioned me on the problems of diversity of citizenship, agency, and the need to get hard facts implicating a corporate officer in a case on fraud. For a fee paid by me, one attorney advised my attorney, *inter alia*, to obtain a temporary injunction to forestall the expected retaliation. My attorney refused to do this.

Shortly after discovery of the fraud on me, I entered into an agreement with the Holiday Inn of Arlington, Virginia, which Griffith had arranged. I expected to use the 92 units still in my original franchise inventory, which an accountant had advised would not earn depreciation unless placed in use. However, Houghtaling himself, according to the company official with whom I was dealing to bypass Griffith, forced upon me the sale of 160 units, half on lease and the other half paid for by me, thus deepening my worsening financial situation. Houghtaling was aware of my situation from review of the financial statement required for lease of the 80 units. My complaints on this and other matters I stated for over three hours on a visit to Houghtaling in person on October 15, 1965. He confirmed the gist of this meeting on deposition but at the trial flatly denied, without objection by my attorney, that I had stated complaints to him. At the trial on August 1, 1968, the judge would not let me consult the detailed, contemporaneous notes which I had kept of the meeting held three years earlier.

Houghtaling's conduct at the October 15, 1965, meeting convinced me that I had to delay overt action on legal proceedings until I had evidence implicating Houghtaling himself. This took an additional three months, until December of 1965, when he directly intervened at the instance of Griffith to interfere with my newly signed contract with the Sheraton-Baltimore Inn, to whose manager Griffith had represented, *inter alia*, that I was no longer a franchised dealer. I wrote Houghtaling letter after letter, sent by registered mail with return receipt re-

quested, addressee only, reciting events to date and threatening legal action, but he failed to make one reply. The judge rejected presentation of this evidence because, he said, I had kept the location.

After December of 1965, I had nothing more to do with Houghtaling or the company, other than getting back equipment sent for repair. From the date I met Houghtaling on March 26, 1965, I had received only two brief messages from him. Apparently he operated almost exclusively by telephone or through men like Griffith. Following an investigation by the Federal Trade Commission on complaint by me and other dealers, Griffith and another man were removed from Houghtaling's home office, although when my attorney queried Houghtaling on deposition as to the details, his attorney objected.

In addition to the misrepresentations listed by the Federal Trade Commission's Assurance of Voluntary Compliance, cited earlier, Magic Fingers personnel (a) represented to me that there was no local dealer other than Griffith when in fact Magic Fingers of Hyattsville resided less than ten miles from me; (b) gave me a false address for Griffith and when my inquiries by telephone and mail to reach Griffith were unsuccessful, persuaded me to desist by referring to Griffith's marital problems and (c) provided me a "training dealer" from Raleigh, North Carolina, who was not a dealer, did not know this area, and had no location to demonstrate the conduct of a franchised Magic Fingers operation, as advertised. My early expressions of doubt were overcome by assurances that this was virgin territory, but I discovered too late that there were dealers, ex-dealers, associate dealers, investors, and ex-investors all over the area.

Reinforcing the Magic Fingers promotional effort, franchising at the time was being touted nationwide by the legal community and by respectable business publica-

tions, as well as by trade associations and the Small Business Administration (SBA), whose general counsel later joined the International Franchise Association (IFA). I met Houghtaling at a small business show sponsored jointly by the SBA with a private promoter. Houghtaling's literature made a point of membership in trade associations, including the IFA. Although my brief on appeal of CA 4207 to the Court of Appeals stated as a material representation the code of ethics which the IFA had represented to be "meaningful", I discovered from inquiry of the U.S. Chamber of Commerce, the concern of the established business community with codes of ethics and the apparent inadequacy of measures to enforce them by private agency compatible with rulings by the U.S. Supreme Court.

The instant case, CA 4909A, is really five cases, all related to or growing out of my franchise experience: the two federal cases presented here, a third suit in antitrust pending in the Maryland U.S. District Court (CA 72-1104-HM), a fourth suit tried with jury in the Arlington County Circuit Court (At Law No. 12435, decided on January 4, 1972) and involving cross-claims of $100,000 which did not deter my suit; and a fifth suit in a Maryland People's Court (15146-Hyattsville, decided on March 28, 1972). The favorable awards in the last two cases, for which I had legal counsel, were rendered worthless by default of defendants, one a corporation which was dissolved and the other an individual not connected with Magic Fingers who departed this area.

My appeal on the first case (CA 4207), *inter alia*, alleged bias on the part of the trial judge, in support of statements I made to the trial judge at the November 19, 1968, hearing on my motion for retrial. This allegation is supported by his failure to respond in the second case (CA 4909A) to my letter, which, no matter what the form, was clear and categorial in expressing

my intent to seek trial by jury. His awareness of my intent was implicit in his promise at the hearing of August 13, 1971, to assign the case to another judge. My intent to seek trial by jury hardly took him by surprise.

The judge's statement in error that I had not engaged counsel contrasts with his letter of November 5, 1970, to his deputy clerk and with his frequent advice to me to obtain counsel, which I did my best to respect. I had in fact retained counsel during the period he referred to, and the attorney (and I) had appeared three times before him according to his court's civil docket.

The judge's decision on my motion for trial by jury at the hearing of August 13, 1971, ignored the disbarment proceedings against the attorney which were underway during the period when demand for trial by jury would have been timely. There was no silence on my part. There was silence on his part. Further, it was the judge's advice, in error, which contributed substantially to the long delays in effectuating service of process during the twenty-three months after suit was commenced and fifteen months before trial was held. The judge's questioning of a witness on Saturday, October 23, 1971, at the Washington Golf and Country Club, which he categorically denied from the bench but which I supported by affidavits submitted by me and a third party, suggests more than bias on his part.

The judge's invocation of CA 4207 as a basis for pronouncing judgment on my motion for trial by jury in CA 4909A (Pet. App. 8-12) provides a basis for collateral attack on his judgment in the earlier case. My comments challenging his findings of fact and conclusions of law in CA 4207 are fully stated by documents presented at the hearing on my motion for re-trial and in the brief and reply brief on appeal of that case to the Court of Appeals, documenting the judge's prosecution of it.

One example to which I took exception on appeal of CA 4207 was the judge's assumption as "fact" the legal possibility that all motels and hotels are potential clients for a Magic Fingers installation, as stated by Houghtaling. However, this is an opinion which exceeds the specific facts presented by me and which Houghtaling's out-of-state attorney countered not with data supported by authority but with a statement by me on deposition taken out of context and for this reason challenged by my attorney. The judge gave no consideration to the facts that it was *my* investment and *my* right to decide to install or not to install *my* equipment in a hotel or motel which may be or is going out of business in an industry noted for its high turnover, offers low income guests as clientele, has low occupancy rates, has a neighborhood reputation for vandalism and theft, etc. This was the purpose of the testimony on the survey which I made and which the judge cut short. Griffith's deposition supported the facts revealed by my survey. Yet the judge apparently considered Houghtaling's facts, which from his deposition were based on letters from dealers kept in his desk drawer, more believable than those presented from my survey. Houghtaling's designation of Griffith as his "Marketing Research Director" reveals his contempt for the profession of which I happen to be a practitioner from former membership in the American Marketing Association and possession of a graduate degree in business administration.

A second example, not supported by fact other than testimony induced by leading questions posed by the court, as my brief on appeal of CA 4207 stated, is the finding that I spent no time on franchise business. In contradiction, I submitted to the Court of Appeals an Internal Revenue statement of field audit verifying my 1965 federal income tax statement and the correctness of a deductible allowance of over 13,000 miles claimed for travel on Magic Fingers' business during the six-months' period

from July through December of 1965. Further, I furnished the Court of Appeals over 150 carbon copies of letters addressed to "prime locations" throughout Maryland, Virginia, and the District of Columbia, which referred to visits in person by me during the period from July into September of 1965.

Gross inadequacy of legal representation is documented by the frequent changes of attorney not due to my cause and from the almost wholesale rejection of my cases by members of the bar. Am I responsible for the disbarment proceedings of my attorney? Am I responsible for the gross neglect of my interests by the attorney who conducted the trial of CA 4207? Responsive to the demand of several attorneys, I prepared a list of eighteen inadequacies in his trial of that case. (Pet. App. 34-36)

To this list I now add: (a) his neglect to point out the significance of "executive agreements" between Magic Fingers and the home offices of motel chains which enabled Magic Fingers to manipulate its dealers; (b) his neglect to point out the significance of "investors" to whom company agents sold "locations" (thus inflating company "earnings") as opposed to sales of franchises to dealers, a situation which was (c) reinforced by the distinction between "active" and "inactive" dealers (14 out of over 160, according to Griffith); (d) his neglect to enter the Donal Hill letter of June 14, 1965, the first paragraph of which states

> "I must admit you are a very decisive person in resigning your job to devote your full time to Magic Fingers. I have every confidence that this will turn out to be an entirely proper decision for you."

and which thus refutes the judge's impression stated at the hearing on my motion for retrial of CA 4207, namely, that while company agents did not encourage me to resign my job, they did nothing to deflate the highly exaggerated printed and verbal representations pro-

moting their franchise offer or to respond truthfully to my many questions about it; (e) his neglect to establish my learning of abuses in franchising, the knowledge of which weighed heavily on my mind and goes far to explain my conduct after discovery of the fraud on me; and (f) his neglect to point out Houghtaling's apparent perjury when at the trial of August 1, 1968, on CA 4207, he stated that I had not complained to him on October 15, 1965, but on deposition recited details of the complaints which I had related to him in person on that date.

From my reading of the law, I now recognize the cause of the substantial injustice I experienced in these two cases: the failure of my attorney to establish the credibility of my testimony in court, which was compounded by his reliance on testimony documented by depositions rather than by direct testimony in court; and the adherence of the legal profession and the courts in general to the view that the franchise agreement is just another contract, permitting dogma to regale truth as heresay. The evidence abundantly demonstrates Houghtaling's fraud and malevancy. My actions before, during, and after discovery of his fraud are, from the view of a fiduciary relationship, a clearly rational and logical response to that fraud and not a confirmation of contract or waiver of fraud.

Apparently many, many other Americans have been defrauded by franchise schemes like Magic Fingers. Franchise offers now rank first on most lists of frauds kept by the Better Business Bureau and by agencies of federal and state governments concerned. Franchise firms have played a major role in corporate insider manipulation of securities, thus inviting action by the Securities and Exchange Commission, and have contributed to the loss of public confidence in the nation's stock markets in recent times. Responsive to this situation, nine states now have statutes restricting franchising: Arkansas,

California, Connecticut, Delaware, Florida, New Jersey, Virginia, Washington, and Wisconsin. Fifteen more states have bills restricting franchising under consideration: Arizona, Georgia, Hawaii, Illinois, Indiana, Kansas, Michigan, Minnesota, New York, Oklahoma, Ohio, Pennsylvania, Rhode Island, Tennessee, and Texas. The Congress of the United States has considered several bills, but to date (1973) has not enacted legislation. This inaction may be attributed to an attitude of expectancy over federal court testing of the Federal Trade Commission's proposed Trade Regulation Rule approach, which, for franchising, prohibits specific misrepresentations and malpractices by franchisors and in effect requires full disclosure. The Federal Trade Commission Act permits only public and not private suit. About the only way in which a franchisee is able to get to the U.S. Supreme Court is by way of antitrust action and, in such instance, the franchisee has the financial resources to go this route and, further, is able to employ attorneys on annual retainer fee.

It is my personal observation from intensive research and broad inquiry going far beyond this Magic Fingers experience, that what I refer to as the "promotional franchise", as opposed to the "traditional franchise", marks an historical conjunction of social forces which has significantly altered the meanings of the words "contract" and "franchise" and derivative terminology. During the "franchise boom" of the early 1960s, the franchise "industry" turned to the leading legal practitioners and from them received a green light. That green light, unfortunately, is still on. Individual franchise decisions by the U.S. Supreme Court which are adverse to their cause are viewed as taking away the just profits of franchisors and giving them to a public whose greed and gullibility are its own pitfalls. This position is vintage 1900 hucksterism, which spawned the economic reform legislation of that period.

If the Supreme Court should find the existence of a fiduciary relationship running from the franchisor to the franchisee, in instances the franchisor dominates the franchisee by virtue of the franchisor's controls and the franchisee's investment in the franchisor's business, then it will, I am sure, obviate the need for further legislation and social turmoil on the subject and remove from the crowded calendars and dockets of state and federal courts most such cases, simply because the franchisor's attorney will turn on the yellow light of caution, the burden of proof now having shifted to the franchisor instead of, under existing law on fraud, being carried by the franchisee. As a layman who has become involved in and committed to the reforms of our courts invited by the Chief Justice, I commend this view of franchising to the enlightened consideration of this high Court.

Because this brief impeaches the standard of conduct of the trial judge by affidavits of myself and a third party, although I make no issue of it here, and because the judge may be known personally to, or have served under, a member of this Court, I respectfully request that such member withdraw from review of it.

SUMMARY OF ARGUMENTS

I. The Court of Appeals incorrectly held that the district court's denial of petitioner's demand for jury trial was a proper exercise of judicial discretion under Rule 39 of the Federal Rules of Civil Procedure. Disbarment proceedings of his attorney under the circumstances were excusable neglect. Petitioner's discovery and prompt notification of the circumstances by letter to the district court stopped running of time nine weeks after respondent's filing of answer to the pleadings. Coming twenty-three months after initiation of case and fifteen months before trial was held, the

delay of eight weeks must be considered reasonable. Petitioner's letter, without advice of counsel, noted he had frequently instructed his attorney to demand trial by jury and advised the court his intent to do so himself, requesting procedure to do this. The court's failure to respond to plaintiff's letter estops court from ruling that petitioner's new attorney's demand for jury trial submitted twelve months later, was too late. The court had sufficient notice of petitioner's intent to demand trial by jury and should have been vigilant to protect the exercise of a constitutional right.

II. The district court's action in denying petitioner's demand for jury trial, in error, raises by collateral attack a presumption of substantial injustice in an earlier case by virtue of the court's reliance on it, thereby raising serious questions as to the fairness of his hearing on that case. A review of the whole case, taking the two cases as one, including depositions, establishes that petitioner's testimony was credible and that respondent's testimony was not.

III. In the earlier case, petitioner provided facts sufficient to sustain a finding that the franchise contract, by virtue of the franchisee's investment in the franchisor's business, is in reality a contract coupled with an interest and thus subject to the intervention of equity to prevent the franchisor's unjust enrichment. A look at the whole of the relationship establishes it as akin to that of a partnership for mutual profit, not that of a franchisor and "independent contractor."

IV. Petitioner seeks leave of this Court to merge this case on appeal with an earlier case and to amend his pleading in the earlier case to state a new and

precedential issue of fiduciary relationship running from the franchisor to the franchisee, subject to the condition that on retrial by jury there will be no award for damages sustained by petitioner in the earlier case. The pleading of this issue in the earlier case is essential to a fair hearing of the petitioner's pleading in the case on appeal.

V. Respondent's acts of retribution for petitioner's commencement of legal proceedings, conducted while an earlier case was pending before the same federal court, causing damages for which this case on appeal was initiated, constitute contempt of the judicial process and accordingly nullify respondent's immunity from favorable award to petitioner on retrial of the earlier case.

VI. This is an extreme case in which petitioner's dire financial situation, in part caused by respondent's acts of retribution for commencement of lawsuit, in which one attorney was disbarred and several attorneys withdrew through no fault of petitioner, and, further, in which legal representation when given was negligent, constitute lack of adequate legal representation and *in toto*, denial of due process of law. Pursuit of legal proceedings against the one attorney for his negligence, in this case, would be harmful to the profession and the onus, accordingly, should be on the profession, state legislatures, and the Congress to correct.

ARGUMENT

I.

The district court's denial of petitioner's demand for jury trial was not a proper exercise of judicial discretion under Rule 39 of the Federal Rules of Civil Procedure.

Petitioner's letter to the district court, following receipt of knowledge of disbarment proceedings against his attorney and stating his intent to demand trial by jury, served as effective notice and did not leave the court cause for doubt or justification for surprise as to petitioner's intent. The court was aware of petitioner's attributions of bias and should have recognized these as sufficient motivation for such action. Furthermore, entries to the court's civil docket reveal that the court itself contributed to the delay of twenty-three months following petitioner's initiation of suit. Despite the court's changing and uncertain demands for effective service, petitioner made every effort to comply. These actions, coupled with the court's professed ignorance as to whether Rule 38 of the Federal Rules of Civil Procedure states the right of trial by jury is "inviolate" (Pet. App. 8-9), serve as an estoppel to the court's ruling that petitioner's motion for leave of court to demand trial by jury came "way too late" and force the ineluctable conclusion that the disbarment proceedings against his attorney constitute extraordinary circumstances excusing petitioner's neglect to make timely demand for trial by jury.

The court acknowledges that under Rule 39 of the Federal Rules of Civil Procedure he has the discretion to order trial by jury upon motion. However, it may well be questioned that such a limitation upon the power of the court is intended, or, if intended, that such a limitation would be valid. *Herron* v. *Southern P. Co.*, 283 US

91 (1931), 81 S Ct 383. It is sufficient that the circumstances show compliance with the spirit of the rules. *Sofarelli Bros., Inc.* v. *Elgin* (CCA 4) 129 F 2d 785. The rules of federal practice and procedure are devised to promote the ends of justice, not defeat them. *Hormel* v. *Helvering*, ~~311~~ 312 US ~~625~~ 552, 61 S Ct ~~394~~ 719.

The court gives as reason for denial the petitioner's waiver in the earlier case, thus invoking collateral estoppel. This is dubious law and doubly so when it transgresses a constitutional right. This Court has defined waiver as an "intentional relinquishment or abandonment of a known right or privilege" and further has stated that "Every reasonable presumption is indulged against a waiver that does not affirmatively appear of record." *Aetna Ins. Co.* v. *Kennedy*, 301 US 389, 57 SCR 809 (1937); *Slocum* v. *New York Life Ins. Co.*, 228 US 364, 33 SCR 523 (1913), *Hodges* v. *Easton*, 106 US 408, 1 SCR 307 (1882). There is no affirmative waiver of record in either of this or the earlier case. To the contrary, the discretion of the judge is very narrowly limited and must, wherever possible, be exercised to preserve a jury trial. *Beacon Theatres* v. *Westover*, 359 US 500 (1959); *Swofford* v. *B&W, Inc.*, 336 F 2d 406, *Cert Den*, 379 US 962, 85 S Ct 653 (1964). Even so, the court should grant relief from waiver in the absence of compelling reasons to the contrary. *AMF Tuboscope, Inc.* v. *Cunningham*, 352 F 2d 150 (1965).

Following receipt of knowledge of disbarment proceedings against his attorney, petitioner sought to obtain the services of counsel which the court repeatedly had advised him to, and did in fact eventually obtain counsel, which he related to the court. He proceeded to demand trial by jury, only to have his constitutional right denied him because he had in good faith depended upon the Good Samaritan advice proferred him by the court, advice which turned out to be partial and not in response to two letters

addressed to the court and expressing petitioner's intent to demand jury trial. Petitioner's conduct qualifies as good faith within the ruling of this Court in *Harris Truck Lines, Inc.* v. *Cherry Meat Packers, Inc.*, 371 US 215, 8 S Ct 283 (1962). Even if petitioner's letters were not considered, his motion for jury trial was submitted less than fourteen months after respondent's filing of answer to the pleading. In the case of *Baker* v. *General Motors Corp.*, DC Mich, 10 FRD 512 (1950), the court considered sixteen months no bar to a demand for jury trial.

II.

The district court's action, under the circumstances, raises by collateral attack a reasonable presumption of substantial injustice in an earlier case by virtue of the court's reliance on it in ruling in error on petitioner's motion for trial by jury in this case.

The district court's denial, in error, of petitioner's demand for trial by jury, by reliance on an earlier case, reflects adversely on petitioner's testimony in that case and thus raises serious questions as to the fairness of his hearing on that case. "A federal court judgment . . . that is reached without due process of law is void and may be attacked collaterally." *Bass* v. *Hoagland*, CA Tex, 172 F2d 205 *Cert Den* 70 S Ct 573 (1949).

A review of the earlier case as a whole and including depositions which the court, on the record, did not read despite his promise to do so, raise a more than reasonable presumption that his decision in that case did not achieve substantial justice and that petitioner's testimony was credible and that respondent's testimony was not, and further, that his ruling dismissing petitioner's allegations of fraud was in error.

In that case, the bulk of the record consisted of depositions. In such a case, the ". . . findings of the trial

court, while worthy of great consideration, are not conclusive in the reviewing court." *Hellenic Lines, Ltd.* v. *Brown and Williamson Tobacco Corp.*, 277 F2d 9; *Skinner* v. *Parnell*, 257 F2d 345. The reviewing court may reverse where findings are without substantial evidence to support them, where the district court misapprehended effective evidence, and where, although there is evidence which, if credible, would be substantial, the force and effect of testimony considered as a whole convinces that the finding is so against the great preponderance of credible testimony that it does not reflect or represent the truth and the right of the case. *Western Cottonoil Co.* v. *Hodges*, 218 F2d 158 (1955). Thus the reviewing court is left with the definite and firm conviction that a mistake has been made (*Bishop* v. *U.S.* 266 F2d 657; *Bullock* v. *Tamiani Trail Tours, Inc.*, 266 F2d 326; *Commissioner* v. *Duberstein*, 363 US 238, 80 S Ct 1190) and ". . . has power to inquire with regard to the jurisdiction of the inferior court, either in respect to the subject matter or to the person, even if such inquiry . . . [involves] an examination of facts outside of, but not inconsistent with, the record." *Johnson* v. *Zerbst, Warden*, 304 US 458 (1938).

Evidence on the many instances of respondent's fraud and malpractices is uncontroverted. There is an Assurance of Voluntary Compliance by the Federal Trade Commission signed by the respondent company president and admitting misrepresentations as alleged in part by petitioner. (Pet. App. 21-23). "We have held on many occasions that the determinations of the [Federal Trade] Commission, an expert body charged with the practical application of the statute [FTC Act], are entitled to great weight." *FTC* v. *Texaco*, 393 US 223; *FTC* v. *Motion Picture Advertising Service Co.*, 344 US 392 (1953); *FTC* v. *Cement Institute*, 333 US 683 (1948).

Respondent's representation, *inter alia*, that there were no dealers in petitioner's area was documented to be false. There was an apparent perjury by respondent company president. The company agent acting on the president's instructions was disreputable by account of three witnesses, on the record interfered with petitioner's contractual relationship with the Sheraton Baltimore Inn, and later, while the earlier case was being tried by the same district court, interfered with petitioner's contractual relationship with the Hospitality House of Arlington, Virginia, for which the second suit was instituted. [Note: In a collateral case tried by jury in the local Arlington County Circuit Court involving related facts and witnesses, the court there rendered petitioner a favorable award.] The purported termination of contract, following petitioner's commencement of legal proceedings by five months, was transparently arbitrary and spurious. "Positive, uncontradicted testimony as to a particular fact should control the decision of the court unless it is inherently improbable, unreasonable, or questionable." *Dudley* v. *U.S.*, 428 F2d 1196 (1970).

The court based its decision essentially on the admitted fact that petitioner had engaged in one business transaction with respondent after he discovered the fraud committed on him, thus waiving the fraud. Petitioner did not waive the fraud, he sat on it. His financial circumstances left him no realistic alternative but to work his way out of the bad situation into which respondent had misled him by fraud and deceit. "It seems that in hardly any jurisdiction will the damage action be barred if at the time of discovering the facts the defrauded party had reached a point at which it was impractical to stop or he was placed in a position from which he would have been unable to recede without substantial prejudice." *37 Am Jur 2d 395.* Petitioner's actions hereafter were dictated by economic (and legal) ~~necessities~~ imperatives. *Perma Life*

Mufflers v. *International Parts Corp.*, 392 US 134 (1968). "Benefits to plaintiff are not a consideration, as these create a new incentive to violation."—Concurring opinion by Justice Marshall. Furthermore, since the company president conducted his transactions by telephone or through an agent acting on verbal instructions, petitioner realized that he had to delay commencement of legal proceedings in order to obtain evidence against a company officer in a case involving fraud. This evidence he obtained within three months of his discovery of the fraud on him and within two months after he entered into a contract with the Holiday Inn of Arlington arranged for him by the company agent.

The district court produced such a decision by prosecuting the case, taking 29.8% of the lines of transcript testimony on direct examination of petitioner, compared with 3.7% taken by respondent's counsel, as petitioner's appeal brief stated. The court ruled that fraud on sales differed from fraud on business contracts, as though fraud begins or ends at the prison gate. Like petitioner's attorney, he mistakenly failed to identify the correct legal citation (see above). Further, he posed leading questions ("You really haven't spent very little time in the first year working on this job, did you, according to your statement?"), stated *obiter dicta* without end, browbeat petitioner's relatively inexperienced attorney (Pet. App. 33-34) with frequent interruptions including remarks like "objection sustained" when respondent's attorney had stated no objection, and impatiently excluded or restricted evidence relevant to petitioner's cause, even though he was trying the case without jury. Perhaps his adjudication of an apparently excessive case load (Pet. App. 13) may explain this flagrant violation of the canon on "Interference in Conduct of Trial" of *The Canons of Judicial Ethics* of the American Bar Association. "The court must take and report relevant evidence in full." *Builders Steel*

Co. v. *Commissioner*, 179 F2d 377 (1950). A fair hearing includes the right to be heard and the giving of essential testimony. The essential ingredient is orderly expedition and not mere speed. *Smith* v. *U.S.*, Ala, 79 S Ct 991 (1959). Due process is denied where the procedure tends to shock the sense of fair play. *Howard* v. *U.S.*, 372 F2d 294 *Cert Den* 87 S Ct 2129 (1967). Under Rule 59 of the Federal Rules of Civil Procedure, such conduct is prejudicial and ground for new trial. It is an "illusion that the absence of a jury of itself insures against the possibility of prejudicial intervention by the judge." *In Re Education Association of Passaic, Inc.*, 117 NJ Super 255 (1971).

Canon 2 of *The Canons of Judicial Ethics* states that the courts exist to promote justice. Appellate court decisions occasionally confirm that the courts exist "to subserve and not impede or defeat the ends of substantial justice." *Brown* v. *Gordon*, Cal App, 29 Cal Rpts 901. Because the federal judge is given such extensive power over litigation before him, it is especially important that he not only be but seem impartial. *Barron and Holtzoff (Wright Ed)*, Vol 2B, Section 97.

III.

A franchisee's investment converts his contract to a contract coupled with an interest and thus subjects the contract and the contractual relationship with the franchisor to the intervention of equity.

The petitioner's franchise agreement at the time of signature imposed requirements for a substantial investment of his cash savings, time, and effort. From the moment this contractual relationship was begun, the contract became a contract coupled with the petitioner franchisee's vested interest and the contractual relationship thereafter with the franchisee was subject to the intervention of equity in the event of abuse by any self pref-

erence which resulted in unjust enrichment to the franchisor.

This investment is in the nature of a constructive trust, involving ". . . specific restitution of a received benefit in order to prevent unjust enrichment." From Harold Brown's *Franchising: Trap for the Trusting* (p. 42) quoting Dean Pound's *Progress of the Law: Equity*, 33 Harvard Law Review 420 (1920) and Justice Cardozo ". . . a constructive trust is then the remedial device through which preference of self is made subordinate to loyalty to others." *Meinhard* v. *Salmon*, 249 NY 458, 164 NE 545 (1928).

As society changes, so does the law. Whereas the insurance industry at an earlier decade was almost exclusively intrastate, it is now interstate and the law has grown with it. So, quoting Brown, ". . . the franchisor-franchisee relationship should be primarily governed by common or statutory law in the same fashion as other business associations. Surely, it could hardly be suggested that the status of corporations, partnerships, and joint ventures should have been left solely to the principles of contract and fraud." Brown, *op cit*, pp. 53-54.

"It is not difficult to infer that the colloquialism, 'independent businessman' imports the concept of a property interest as well as the normal attributes of such a vested interest". *Mobil Oil Corp.* v. *Rubenfeld*, NY Civ Ct, 1972, 1973 Trade Cases ¶ 74306. The court in this decision notes that ". . . the franchise industry is practically unregulated by statutory or common law."

IV.

On retrial by jury, this case may be merged with an earlier case to which it is related and the pleading in the earlier case amended to state a new and precedential issue of fiduciary relationship.

Petitioner's earlier suit alleging fraud in the inducement of contract presents facts essential to a finding of fiduciary relationship running from respondent franchisor to petitioner franchisee, except the statement of this relationship as a new and precedential issue. While no case which frees the respondent can be retried if it results in award of damages to respondent, this case should, in equity, be merged with the second case, which has not been tried, and the petitioner permitted to amend his pleading to state the new issue, subject to the condition that on retrial by jury, there will be no award for damages sustained by petitioner in the earlier case. To expedite retrial, petitioner may be restricted in the earlier case to testimony essential to the new issue and to challenge of court rulings restricting such testimony. The pleading of this issue in the earlier case is essential to a fair hearing of the petitioner's pleading in the case on appeal. The purpose of this pleading is to facilitate a proper decision on the merits. *Conley* v. *Gibson*, 355 US 41; *Forman* v. *Davis*, 371 US 178, 83 S Ct 227 (1962). Granting of leave to amend to conform to proof may be conditioned in order to avoid prejudice to opposing party. *Strickler* v. *Pfister Associated Growers, Inc.*, 319 F2d 788 (1963). The claim asserted "arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading." *Copeland Motor Co.* v. *General Motors Corp.*, 199 F2d 566 citing *Teller* v. *Atlantic Coast Line R. Co.*, 323 US 574, 65 S Ct 421 (1945).

The evidence from the record of the earlier case is sufficient to sustain a finding of fiduciary relationship

running from the franchisor to the franchisee, including: the one-sided wording of the agreement and in particular the provision for termination, the controls including those on prices and rates, the representations of technical expertise possessed by the franchisor and of the simplicity of qualifications required of the franchisee, the promise to provide initial and follow-up training on all aspects of the business at factory and field sites, the standardization of product and procedure for operation and maintenance of the business, the promise of protection against competition afforded by the franchisor's copyrighted trademark, the national advertising by which the franchisor promoted its product, the representation that the franchisor would support his franchisees with continuing engineering and marketing research, the representation of membership in reputable business organizations giving an aura of respectability to the business, and the grossly disparate bargaining power of the franchisor in terms of financial and legal advantage over the franchisee. The agreement and the relationship reveal a pervasive and complex transaction by means of which the franchisor could and did dominate the franchisee, could and did find occasion to abuse the relationship through concealment and clandestine operation in self-preference, and strengthened his domination over the franchisee by virtue of controlling and manipulating the franchisee's investment in the franchisor's business. "We must look at the economic reality of the relevant transactions." *United States* v. *Concentrated Phosphate Export Assn.*, 393 US 199 (1968). See *Partners for Profit, A Study of Franchising*, American Management Association, 1966, a research report on franchising giving a business graduate view of these realities.

A finding of fiduciary relationship will be difficult because "most judges . . . have little familiarity with the franchise relationship so that counsel must make a painstaking exposition of the facts in the particular case. With-

out this effort, the franchisee's complaint will run into a stone wall of incredulity." However, ". . . the fiduciary nature of the franchise relationship was recently informally recognized by the Federal Trade Commission, the agency perhaps most intimately familiar with franchising and statutorily intimately familiar with franchising and statutorily concerned through its obligation to prevent 'unfair methods of competition.' The General Counsel of the FTC stated: '(F)ranchisors frequently speak of their relationship with their franchisees as being one of trust and confidence. It is truly a fiduciary relationship.'" Brown, *Franchising—A Fiduciary Relationship*, 49 Texas Law Review 650 (1971) p. 664.

Corpus Jurus Secundum (Vol 36A), states that a fiduciary relationship exists when ". . . the confidence reposed by one person was actually accepted by the other . . . together with conditions extending to the one an advantage over the other." (pp. 385, 387) In *Broomfield* v. *Kosow*, 349 Mass 749, 212 NE 2d 556 (1965), the court found a fiduciary obligation not after the contract had been signed but at its very signing. "Basically, the success of the franchisors lies with their franchisees. No one else is as avidly interested in the success of the entire enterprise. By and large, the franchisees represent the finest in American society, hardworking, serious, and willing to have staked their life's savings. Given the past history of franchising, it will be difficult for the franchisor to realize that its best interests lie in giving its franchisees more power and control over their franchises. But the franchisor that can meet this challenge may find the same kind of relief which Henry Ford did in the early 1930s, when his franchise dealers saved his company from financial ruin." Brown, *Franchising: Trap for the Trusting* p. 107. See also Brown's forthcoming treatise *Franchising Realities and Remedies*, which is scheduled to be published shortly in the New York Law Journal.

In these two cases, the franchisee cannot possess the status of the "independent contractor" ascribed to him by the franchise agreement. A just and due regard for the whole of the relationship will establish it as akin to that of a partnership for mutual profit and from such a relationship will be derived a finding of the franchisor's fiduciary obligation to his franchisees.

V.

Respondent's acts of retribution for petitioner's commencement of legal proceedings, conducted while an earlier case was pending before the same federal court, causing damages for which a second case was initiated, nullify respondent's immunity from favorable award to petitioner on retrial of the earlier case.

The franchisor's actions in both these cases reveal a ruthlessness of purpose to dominate the franchisee exceeding license. His participation in his agent's clandestine and disreputable efforts to cause loss to petitioner of the Sheraton-Baltimore Inn location, his arbitrary termination of contract, and the malicious intermeddling of his agent in petitioner's contract relationship with the Hospitality House within a short distance of the same court in which respondent's conduct was placed in issue by petitioner's allegation of fraud in inducement of contract are transparent acts of malice which are contemptuous of that good faith and fair dealing which must exist to sustain the viability of the free market place in a democratic society and, accordingly, nullify respondent's immunity from favorable award to petitioner on retrial of the earlier of these two cases. The badge of justice and of this Court should not be used to protect and reward such conduct.

"In every contract there exists an implied covenant of good faith and fair dealing. Neither party will do anything having the effect of destroying or injuring the right

of the other party to receive the fruits of the contract." *Lutz* v. *Rayberry*, 148 NYS 2d 762. See also *Division of the Triple T Service, Inc.* v. *Mobil Oil Corp.*, 304 NYS 2d 191 (1969), *Affirmed*, 311 NYS 2d 961 (1970). "But is there any principle which is more familiar or more firmly embedded in the history of Anglo-American law than the basic doctrine that courts will not permit themselves to be used as instruments of inequality and injustice. . . . The law is not so primitive that it sanctions every injustice except brute force and downright fraud." Justice Frankfurter in *United States* v. *Bethlehem Steel Corp.*, 315 US 289, 62 S Ct 581 (1942).

VI.

Petitioner's lack of adequate legal representation, *in toto*, constitutes denial of due process of law.

From the facts of these two cases, petitioner has been unable to afford adequate legal representation, making him prey to the very party he had to sue to obtain redress of his just grievances. The law assumes that adversaries in the arena of the law come prepared as parties on equal footing before the law and that justice is even-handed, rewarding and penalizing where in good conscience it should. Taken together, these two cases show a miscarriage of justice which has served to reward acts of fraud and lack of decent scruple. How could this be?

New and increasingly complex fields of law create demands for practitioners who are specialists and who demand premium fees for their advanced and specialized knowledge. This widens the gap between those who have and those who do not have the financial resources to pay these fees, should, as in these two cases, an aggrieved party have need for such specialized services. Members of the legal profession may have declined their services because of their lack of familiarity with the new and

specialized field of franchising, or because they may have concluded that petitioner's cases were a lost cause.

It is more probable, as petitioner represents, that his dire financial circumstances, in part caused by respondent's acts of retribution for petitioner's commencement of lawsuit, were the major consideration. Further, petitioner suffered the indignity of having his attorney disbarred by no cause of his own at a time when need for competent legal services was crucial. His legal representation before the district court in the earlier case was so inadequate as to strain the credulity of the judge in the testimony of petitioner as his own witness and to create a confusion in the mind of the judge to the point of denying petitioner's constitutional right to trial by jury in the case on appeal. This gross inadequacy of legal representation constitutes denial of due process. Petitioner's pursuit of legal proceedings against the one attorney for his negligence, in this case, would be harmful to the profession and the onus, accordingly, should be on the profession to correct.

The first duty of an attorney is to justice. *In Re Kelley*, 243 F 696; *Pearse* v. *U.S.*, 59 F2d 518; *Loughlin* v. *U.S.*, 57 F2d 1080; *U.S.* v. *Frank*, 53 F2d 128. "It has become apparent that many attorneys erroneously believe that upon a failure or refusal by a client to pay the remainder or a portion of the unpaid fee, an attorney has the right to withhold his services until the fee is paid. However, attorneys do not have such right—indeed such withholding of services constitutes a breach of the duties imposed on an attorney by the Code of Professional Responsibility, and such breach is a sufficient ground for the imposition of disciplinary action. *Virginia Bar News*, Jan/Feb 1973.

Due process includes the right to trial by an impartial judge. He has a duty not only to refrain from acts of bias but also to avoid the appearance of unfairness. A

judge may not act in the dual capacity of judge and advocate. *American Jurisprudence 2* Volume 7, page 146 ff. Section 167.

CONCLUSION

Petitioner respectfully requests that this Court rule that:

A. Disbarment proceedings constitute excusable neglect under Rule 39 of the Federal Rules of Civil Procedure and petitioner's motion for jury trial should have been granted for this reason.

B. Petitioner's letter expressing his intent to demand trial by jury, in absence of reply by the district court, meets the Seventh Amendment requirement for demand of trial by jury.

C. The district court's denial, in error, of petitioner's right to trial by jury in this case, on appeal, by reliance on an earlier case, raises by collateral attack a presumption of lack of fair hearing in that case and a denial of substantial justice in both cases considered as a whole.

D. Respondent's acts of retribution against petitioner for commencement of legal proceedings, conducted while an earlier case was pending before the same court, causing damages for which this case on appeal was initiated, nullify respondent's immunity from favorable award to petitioner on retrial of the earlier case.

E. Petitioner's investment in franchisor's business converts his franchise agreement to a contract coupled with an interest and thus subjects the agreement and relationship to the intervention of equity.

F. Petitioner's lack of adequate legal representation in these two cases constitutes denial of due process.

Pursuant to these rulings, petitioner respectfully submits that this Court should:

G. Reverse the judgment of the Court of Appeals.

H. Remand the case on appeal for retrial in the district court by another judge with jury.

I. Merge the case on appeal with the earlier case and grant leave to petitioner to amend his pleading in the earlier case to state the issue of a fiduciary relationship running from the franchisor (respondent) to the franchisee (petitioner) with damages as pleaded for both cases, or, alternatively, as pleaded for the case on appeal only; or, alternatively, merge the case on appeal with the earlier case and order retrial of both cases as one in equity, with facts in the earlier case limited to those of record and to challenge of court rulings restricting relevant testimony.

RICHARD I. KRODEL
Pro Se
304 N Street, S.W.
Washington, D.C. 20024

APPENDIX

ARCHIVE

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APPENDIX

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 72-1094

RICHARD I. KRODEL,
Appellant,

versus

JOHN J. HOUGHTALING, ROGER GRIFFITH, MAGIC FINGERS, INC.,
Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Oren R. Lewis, District Judge.

(Decided October 26, 1972)

Before HAYNSWORTH, Chief Judge, SOBELOFF, Senior Circuit Judge, and FIELD, Circuit Judge.

Richard I Krodel, proceeding pro se; W. W. Koontz, attorney for appellees.

PER CURIAM:

Plaintiff appellant sued the defendants for malicious interference with his contract rights, and on this appeal challenges four rulings of the district court: (1) denial

of plaintiff's motion for a jury trial, (2) denial of his motion for a continuance, (3) dismissal of the action for lack of prosecution, and (4) denial of plaintiff's motion for a new trial.

Although the Federal Rules of Civil Procedure preserve the right of trial by jury, Fed. R. Civ. P. 38(a), a timely demand for a jury trial must be filed. Fed. R. Civ. P. 38(b), (d). Since the plaintiff failed to file such a demand, the district court properly denied the motion for a jury trial.

The granting of a continuance is a matter which lies within the sound discretion of the trial court, and the district court's ruling on such motion will not be disturbed absent a showing of abuse of discretion. *Montgomery* v. *Commissioner of Internal Revenue*, 367 F. 2d 917 (9th Cir. 1966). The plaintiff sought a continuance to enable him to contact material witnesses, but the record reveals that he had neither interviewed nor subpoenaed any of these individuals. The record further indicates that plaintiff knew nothing of the testimony he expected to elicit from these witnesses, and under these circumstances it is manifestly clear that the district judge did not abuse his discretion in denying the motion for a continuance.

District courts have "sound judicial discretion" to dismiss an action for "plaintiff's failure to prosecute it with reasonable diligence * * *." *Timmons* v. *United States*, (4 Cir. 1952). The plaintiff had ample opportunity to develop evidence in support of his case, but he neither interviewed nor subpoenaed witnesses whose whereabouts he knew. Furthermore, the plaintiff himself declined to testify. The district court's dismissal of the action finds strong support in the record and was well within the court's discretion.

The decision whether to grant or deny a new trial is also a discretionary matter with the trial court. *Hopkins* v. *Coen*, 431 F. 2d 1055 (6 Cir. 1970); *United States* v. *Bucon Construction Company*, 430 F. 2d 420 (5 Cir. 1970). In his motion for a new trial the plaintiff asserted that he had discovered new evidence and that he had been prejudiced by reason of bias on the part of the trial judge. However, the plaintiff refused to disclose his newly discovered evidence to the court, implying that he feared such disclosure might result in intimidation of his material witnesses. This conduct on the part of the plaintiff made it impossible for the district court to appraise the alleged new evidence as a ground for granting a new trial. The plaintiff's contention that the trial court was biased finds no support whatever in the record. Accordingly, we find that the district court acted properly in denying the motion for a new trial.

Finding no error in the challenged rulings, the action of the district court is affirmed.

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 72-1094

RICHARD I. KRODEL,
Appellant,

versus

JOHN J. HOUGHTALING, ROGER GRIFFITH,
MAGIC FINGERS, INC.,
Appellees.

[Filed Jan. 12, 1973, William K. Slate, II, Clerk]

ORDER DENYING REHEARING

Upon careful consideration of the petition for rehearing, with the concurrence of Chief Judge Haynsworth, the petition is denied. Judge Sobleoff did not participate in consideration of the petition for rehearing.

/s/ [Illegible]
United States Circuit Judge

A True Copy, Teste:
William K. Slate, II, Clerk

By /s/ Virginia Lipford
Deputy Clerk

A-5

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Civil Action No. 4909-A

RICHARD I. KRODEL,
Plaintiff,
v.
JOHN J. HOUGHTALING, ET AL,
Defendants.

ORDER

This action came on for trial the 19th day of October, 1971, and upon motion of counsel for the defendants John J. Houghtaling and Magic Fingers, Inc., it is

ORDERED that this action be, and the same hereby is, dismissed for failure to prosecute on the part of the plaintiff.

ENTERED this 29 day of October, 1971.

/s/ Oren R. Lewis
United States District Judge

SEEN:

BOOTHE DUDLEY KOONTZ
BLANKINGSHIP & STUMP
711 Princess Street
Alexandria, Virginia 22314

By /s/ W. W. Koontz
W. W. KOONTZ
Counsel for Defendants

SEEN AND OBJECTED TO:

MARY COOK HACKMAN
Attorney at Law
2009 North 14th Street
Arlington, Virginia 22201

/s/ Mary Cook Hackman
Counsel for Plaintiff

FRANCES G. BECK
Attorney at Law
1925 North Lynn Street
Arlington, Virginia 22209

/s/ Frances G. Beck
Co-Counsel for Plaintiff

[1]
IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Civil Action No. 4909-A

RICHARD I. KRODEL,
Plaintiff,

v.

JOHN J. HOUGHTALING, ET AL.,
Defendants.

Before
HON. OREN R. LEWIS
United States District Judge

August 13, 1971

APPEARANCES:

MARY COOK HACKMAN and
FRANCES G. BECK
For the Plaintiff

W. W. KOONTZ, ESQUIRE
For the Defendants

[2] PROCEEDINGS

THE COURT: Did you have something, Miss Hackman?

MISS HACKMAN: Yes, I do, your Honor.

THE COURT: Let us hear it.

MISS HACKMAN: Mr. Koontz was here a moment ago.

THE COURT: Who?

MISS HACKMAN: Mr. Koontz. I think he stepped out.

THE COURT: Call it. What is it?

THE CLERK: I don't find it.

MISS HACKMAN: A motion for a jury trial set down for today.

THE COURT: Let us see the motion, if we have one. Is Mr. Koontz out there? If he is here—

I don't know what it is.

MISS HACKMAN: 4909.

THE COURT: Here he is.

What is the number?

MISS HACKMAN: 4909.

THE COURT: He will get it.

[3] MISS HACKMAN: The Krodel case, your Honor.

THE COURT: What?

MR. KOONTZ: Krodel case.

THE COURT: What about it?

What is the motion?

MISS HACKMAN: Motion for jury trial, your Honor.

THE COURT: Hasn't this case already been set?

MISS HACKMAN: Yes, it has, your Honor, for October 11th.

THE COURT: Hasn't this question already been ruled on?

MISS HACKMAN: It was taken up in your chambers when the case was set. At that time we made a request for jury trial and you pointed out that the time under Rule 38 had elapsed. However, you did say that for good cause shown and in the Court's good discretion the jury trial could be granted.

THE COURT: I did say then and I'll say it again that I am satisfied that the Court has the discretion.

MISS HACKMAN: We're satisfied of that.

THE COURT: —to waive the rule or any other rule that the Court thinks it is proper.

[4] I try to be as nice to you two young ladies as I could by telling you that I have never done it. We have a fixed rule over here that we don't allow delayed juries.

I would much prefer, as far as myself is concerned, trying a jury trial at any time because I don't have to make findings of fact and I don't have to write an opinion, so if I was looking at it just from a lazy man's standpoint I would give it to the jury, and as soon as I give them an oral instruction and if they come in and make findings the jury doesn't have to say why they reached a conclusion. They just say judgment for the plaintiff or judgment for the defendant, and, of course, if it is for the plaintiff they fix the amount.

I believe I also indicated, although I wouldn't even guaranty this, but I would probably count on it, I believe I also indicated at the pretrial that since I heard the other trial, and although I do not have any doubts in my own mind that what I heard then wouldn't disturb me, I mean if I didn't hear enough evidence the second time, what I heard the first would not influence me, I don't think, in the slightest, but I believe I indicated if we had another judge, and we do now have one, that the probabilities are [5] I would ask him to hear it because it is cold to him, I mean factually, so he couldn't be influenced by anything.

What is your good cause for a jury trial?

MISS HACKMAN: This is it, your Honor.

THE COURT: Because you are going to convince me I ought to do what I have not done before.

MISS HACKMAN: I don't think these circumstances have arisen before, fortunately, your Honor. They arise very, very rarely.

Rule 38 does say that the right to a jury trial shall be maintained inviolate. It also allows for waiver—

THE COURT: I don't know it says anything about maintain inviolate. I don't remember that language.

MISS HACKMAN: Rule 38(a).

THE COURT: What?

MISS HACKMAN: Rule 38(a) uses the word inviolate, shall be maintained inviolate to the parties. It also allows for waiver. The waiver, of course, has to be a knowing and intelligent waiver as of any other constitutional right.

THE COURT: How could you have anything but a knowing intelligent waiver, if you tried the case once, and didn't he try the case?

[6] MISS HACKMAN: This is another case.

THE COURT: What?

MISS HACKMAN: It's another case.

THE COURT: It is the same thing for practical purposes.

MISS HACKMAN: Another action, your Honor.

THE COURT: I understand it grows out of the same thing and he tried the other one without a jury, didn't he?

MISS HACKMAN: I believe so, your Honor. I didn't represent him at that time.

THE COURT: I don't know.

I mean why do you want a jury trial?

MISS HACKMAN: Let me say this, your Honor. The time set under Rule 38 expired in May of 1971, would have expired by May 31, 1971. At that time Mr. Krodel, the plaintiff, had retained counsel. I will not say he was represented by counsel, because he wasn't represented by counsel.

The counsel he had retained, Mr. Smith, was disbarred. The order of disbarment was entered on March 15 of this year. The hearings before the Grievance Committee of the Tenth District Bar Association were held in May of [7] last year. At that time the Tenth District Grievance Committee informed him they were going to proceed with the disbarment action. Mr. Smith at that time disappeared, left the country, it is believed, came back very briefly and then left again and hasn't been seen now for about thirteen months.

The Tenth District Grievance Committee proceeded in his absence to hear testimony, to recommend, to file the bill of complaint for disbarment, and he was disbarred. He was disbarred for embezzlement of a client's funds, simply.

In other words, during the last months before he was brought up on charges before the Grievance Committee his interests were adverse to the clients. The clients who thought they were being represented by him were not. His interests were fairly consistently adverse to those clients.

Now, Rule 38 does say that the right of jury trial is retained by the parties.

I think that our contention, your Honor, is that the plaintiff in this case was not being represented by counsel and counsel failed to ask for a jury trial.

THE COURT: He had no counsel. You understand that.

MISS HACKMAN: Yes.

[8] THE COURT: Counsel did not file this suit.

MISS HACKMAN: Now, the question is did the plaintiff waive that and in that connection I would like to call your Honor's attention to a letter which was in the jacket which was filed in this court by the plaintiff in July of 1970, as soon as he was notified that Mr. Smith would no longer represent him, in which he—

THE COURT: I don't know Mr. Smith, and I do not even know who he is.

MISS HACKMAN: I don't know him either.

THE COURT: He didn't even enter in this case, but the facts are that I believe the record will indicate, and I may be wrong—I know I told him on several occasions that by all means he ought to have an attorney, that if he really had a claim to present, since it was rather apparent that he was not too good at presenting his own,—I mean I was just being frank with him—that he either ought to forget the matter if it wasn't of that importance to him

or get himself an attorney, whether he had to pay a fee, if he couldn't get one on a contingent basis, and I very clearly told him I doubt if he could get a good attorney on a contingent basis, and I urged him, and I am sure he got several letters on notices, pretrials and others, when that was [9] reiterated again, and so forth.

So he knew all about this situation.

The facts are that he gets two very nice lady lawyers, and they want to get a jury. Well, they have to take their cases as they find them.

I would not have any objections other than the fact, as I say, there is one virtue I have in my crude manner —I try to treat them all the same, men and women lawyers. I have turned down so many requests and I can see myself now, if I give you a jury trial, the next fifteen are coming in here, and I don't mind being kidded. saying that you do things for ladies that you don't do for men.

Well, I would plead guilty to that, I do it every day, do things for ladies that I don't do for men, but I am not going to give you a jury trial.

MISS HACKMAN: Has your Honor seen the letter from the plaintiff which is in the jacket which was addressed to the Clerk of this Court?

THE COURT: I think I did but I am not sure.

MISS HACKMAN: In which he said he repeatedly asked his counsel of record to ask for a jury trial.

THE COURT: He has no counsel of record.

MISS HACKMAN: He had counsel of record at [10] that time.

THE COURT: Who did he have?

MISS HACKMAN: He had Mr. Smith who had filed these papers for him.

THE COURT: Mr. Smith, he was not counsel of record. You said he was not counsel of record.

MISS HACKMAN: I said he was counsel of record, your Honor. He had been retained, but he wasn't representing the plaintiff.

Now, the plaintiff had the right to a jury trial.

THE COURT: If the attorney waives it, if the attorney waives it or does not ask for it, isn't is waived?

MISS HACKMAN: It certainly is, your Honor, if that attorney is representing his client.

THE COURT: The mere fact—if that were not true, there is not any reason for a jury trial, there is nothing —This is about as simple a case as I have ever heard—if it's on the same basis. There is not a thing complicated about it.

MISS HACKMAN: I don't know that, your Honor. I am not familiar with the first case.

THE COURT: You ought to be familiar with it.

[11] MISS HACKMAN: I will be.

THE COURT: It is a case very frankly that ought to be heard without a jury but that does not say, since it is for money, otherwise will you be entitled to it because it is a simple factual question based upon an alleged franchise invasion.

Isn't this the one on that bedsprings or whatever you call it?

MR. KOONTZ: Magic fingers.

MISS HACKMAN: It's the one—I don't know whether it's the same cause of action, your Honor.

THE COURT: I am satisfied it is, and the only reason I let him do it again because he was going to get somebody in the hopes that it was a sufficient amount.

Motion for jury trial is denied. It comes way too late.

And, as I say, not that it would embarrass me at all, but just to make sure that he has no cause for complaint, I will get another judge.

When is it set for? I will even put his name on it.

MISS HACKMAN: Set for October.

MISS BECK: October 11th, your Honor.

[12] MR. KOONTZ: I think you ought to hear this case to facilitate it. You know the background, if you don't want to get in all the other cases.

THE COURT: I know you think I should.

MR. KOONTZ: You have done a pretty good job for me so far.

THE COURT: According to your side on this one, but as to some of them, especially the last one you had, you didn't think I did a very good job. did you?

MR. KOONTZ: You mean in Krodel?

THE COURT: No. You thought I did a good job. I'm talking about Susquehanna.

MR. KOONTZ: We haven't finished Susquehanna. I thought you did a very good job of Krodel. You keep it alive two years after it was tried.

THE COURT: You want to save me fresh for Monday, don't you?

MR. KOONTZ: Yes, sir.

THE COURT: You want me to be fresh Monday and well rested.

MR. KOONTZ: I hope so.

THE COURT: I am going to put this down.

MISS HACKMAN: Judge Bryan?

[13] THE COURT: I could not guaranty Judge Bryan. If he isn't here it will be another judge. We will either have Judge Bryan or another judge here, I hope, from now on. But it will not be Lewis. You will not have to fuss with me.

If I got you one, like I ought to, it would be nice, if I got you one like Emory Widener, he has a different rule.

MISS HACKMAN: I know Judge Widener.

THE COURT: I don't know whether he applies it in civil cases but in criminal cases he will even continue a case, let you get a jury the next week, if you just change your mind that morning. He only has fourteen cases to try a year. I had 514. You see, it does make a difference.

MISS HACKMAN: He runs a very wide circuit.
THE COURT: Anything else?
THE CLERK: Nothing further, sir.

(Whereupon, at 12:01 p.m., August 13, 1971, the motion in the above entitled matter was concluded.)

SUPREME COURT OF THE UNITED STATES

No. A-937

RICHARD I. KRODEL,
Petitioner,

v.

JOHN J. HOUGHTALING, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including June 11, 1973.

/s/ WEB
Chief Justice of the United States

Dated this 15 day of March, 1973

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Civil Action No. 4909-A

RICHARD I. KRODEL,
Plaintiff,

vs.

JOHN J. HOUGHTALING, ROGER GRIFFITH,
MAGIC FINGERS, INC.

Serve: John J. Houghtaling, President
Defendants.

COMPLAINT

COMES NOW the plaintiff and alleges as follows:

1. Richard I. Krodel, the plaintiff, is a citizen of Washington, D. C.

2. The defendant, Magic Fingers, Inc. is a corporation incorporated under the laws of Delaware.

3. Plaintiff's jurisdiction is founded upon diversity of citizenship and the amount in controversy exclusive of interest and costs exceeds TEN THOUSAND DOLLARS ($10,000.00).

4. The individual defendants are all non-residents of the State of Virginia and are transients currently to be found within the jurisdiction of this Court by virtue of their personal presence and/or by virtue of the fact that they are doing business within the geographical jurisdiction of this Court.

5. That on or about March 3, 1967, plaintiff was assigned a contract for collecting and servicing Magic

Fingers equipment at the Hospitality House Motor Inn, 2000 Jefferson Davis Highway, Arlington, Virginia.

6. That in March through September, 1967, the defendants, with full knowledge of said agreement and intending to harass, annoy, and persecute and injure, and otherwise interfere with due prosecution of plaintiff's business, did wrongfully, fraudulently, and knowingly, intentionally and maliciously persuade and procure the said Hospitality House Motor Inn to repudiate and cancel said agreement with plaintiff.

7. That said Hospitality House Motor Inn would not have breached the agreement as aforesaid with plaintiff, but for the wrongful conduct of defendants as aforesaid.

8. By virtue of the deliberate, wilful, wanton, wrongful conduct of the defendants, plaintiff is entitled to punitive damages in the sum of $50,000.00.

WHEREFORE plaintiff demands judgment against defendants and each of them in the sum of $15,000.00 compensatory damages plus $50,000.00 punitive damages.

/s/ Richard I. Krodel
RICHARD I. KRODEL
304 N Street, S.W.
Washington, D. C.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Civil Action No. 4207

RICHARD I. KRODEL,
Plaintiff,

vs

JOHN J. HOUGHTALING, THOMAS M. LEDDY, WALTER V. GALLAND, ROBERT FLEMING, ROBERT ROBINS (ROBBINS), ROGER GRIFFITH, MAGIC FINGERS, INC.,
Defendants.

COMPLAINT

Comes now the plaintiff by his attorney and alleges as follows:

1. Richard I. Krodel, the plaintiff, is a citizen of Washington, D. C.

2. The defendant, Magic Fingers, Inc. is incorporated under the laws of New Jersey.

3. Plaintiff jurisdiction is founded upon diversity of citizenship and the amount is controversy exclusive of interests and costs exceeds $10,000.00.

4. The individual defendants are all non-residents of the District of Columbia and are transients currently to be found within the jurisdiction of this Court.

5. That on or about June 10, 1965, plaintiff entered into a contract with corporate defendant in which plaintiff agreed to become a Magic Fingers dealer using the name of "Magic Fingers of Marva."

6. The defendants and all of them have used fraud and deceit to induce the plaintiff to purchase the aforesaid dealership purveying a product known as "Magic Fingers."

7. That defendants and each of them for themselves and as agents for one another claimed that they had a patent for the Magic Fingers vibrator, when, in fact, they were denied the patent in 1964.

8. The defendants as aforesaid claimed that defendant Roger Griffith was the nearest dealer to the Washington-Baltimore area, when, in fact, there were many dealers including Harry Smith, doing business as MAGIC FINGERS OF HYATTSVILLE, in the aforesaid metropolitan area.

9. That defendants as aforesaid promised to provide complete marketing data on every aspect of the business but later admitted that there was no marketing data available.

10. That defendants as aforesaid claimed that no fees, royalties, or hidden charges would be made to plaintiff for discovering locations but in fact plaintiff was charged a finder's fee of $80.00 for the Holiday Inn of Arlington in which to place said product.

11. That as a result of defendants' fraudulent inducement, plaintiff sustained the following losses:

a. Resignation of former employment in order to become a Magic Fingers Dealer, sustaining a loss of income of $11,700.00 for 13 months.

b. $4,000—for cost of Magic Finger franchise.

c. $5,520—cost of lease of Magic Fingers units.

d. $80.00—business expenditures in 1965

f. $1,290—business expenses for 1966 to date

g. $7,000 profit per year for loss of hotel and motel locations cultivated by plaintiff and taken over by defendants unlawfully.

12. By virtue of the fraud and deceit aforesaid plaintiff is entitled to punitive damages in the sum of $100,000.00.

WHEREFORE, the premises considered the plaintiff demands judgment against defendants and each of them in the sum of $32,090 plus punitive damages of $100,000 caused by defendants' fraud and deceit.

RICHARD I. KRODEL

By _____
Counsel

COLBY & BOWLES
114 South Royal Street
Alexandria, Virginia
836-5444

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

STATE OF FLORIDA) ss: File No. 662 3440
COUNTY OF DADE)

ASSURANCE OF VOLUNTARY COMPLIANCE

John J. Houghtaling, being first duly sworn, hereby deposes and states as follows:

1. That he is President of Magic Fingers, Inc., a corporation, organized under the laws of the State of Delaware in 1961 with principal offices located at 235 West Main Street, Patchogue, New York.

2. That Magic Fingers, Inc. manufactures and promotes through the use of franchised dealers the Magic Fingers vibrating bed massage device.

3. That in order to obtain franchised dealers, said company had disseminated advertisements in newspapers and magazines offering to supply information to interested parties.

4. That individuals who have responded to said advertising, are supplied with booklets, brochures and other materials which contain the following statement:

> "Most Magic Fingers dealers make at least $10,000 the first year in quarters alone, but earnings of $15-20,000 are not unusual."

5. That said booklets, brochures and other materials contain representations that gross revenue from the coin operated units will average $1.75 per unit per month.

6. That the Federal Trade Commission is of the opinion that the above statements and representations are unwarranted and may deceive individuals purchasing the company's franchises with respect to gross revenue to be expected from operation of said franchise.

7. That Magic Fingers, Inc. in promoting the sale of its franchises, in the future, will cease and desist from representing that:

> Their franchised dealers will earn any stated or gross or net amount; or representing, in any manner, the past earnings of dealers, unless in fact the past earnings represented are those of a substantial number of dealers and accurately reflect the average earnings of these dealers under circumstances similar to those of the dealer to whom the representation is made.

8. That the assurance furnished herein is for settlement purposes only and does not constitute an admission that said company has engaged in any illegal practices; also, that the furnishing of such assurance does not bind the Commission as to future action in the matter.

9. That said company shall, within six months after the Commission's acceptance of this Assurance of Voluntary Compliance, file with the Commission a report in writing setting forth in detail the manner and form of its compliance with the terms of said Assurance.

MAGIC FINGERS, INC.

By /s/ John J. Houghtaling
President

/s/ John J. Houghtaling
Individually

Subscribed and sworn to before me, a notary public in and for the County of Dade, State of Florida, this 3rd day of December, 1968.

/s/ Linda R. Garman
Notary Public

My Commission expires

Notary Public, State of Florida at Large
My Commission Expires July 16, 1972
Bonded Through Fred W. Diestelhorst

Assurance of Voluntary Compliance No. 1666

Approved by Commission May 20, 1969

Judgment on Decision by the Court CIV 32 (7-63)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria

Civil Action File No. 4207

RICHARD I. KRODEL

vs.

JOHN J. HOUGHTALING, ET AL.

JUDGMENT

This action came on for trial before the Court, Honorable OREN R. LEWIS, United States District Judge, presiding, and the issues having been duly tried (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that judgment is hereby entered in favor of the Defendants in accordance with the decision by the Court.

Dated at Alexandria, Virginia, this 1st day of August, 1968.

W. FARLEY POWERS, JR.
Clerk of Court

By: /s/ R. V. Brownell, Jr.
Deputy Clerk

[SEAL]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 13,348

RICHARD I. KRODEL,
Appellant,

versus

JOHN J. HOUGHTALING, THOMAS M. LEDDY, WALTER V. GALLAND, ROBERT FLEMING, ROBERT ROBINS (ROBBINS), ROGER GRIFFITH, and MAGIC FINGERS, INC.,
Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Oren R. Lewis, District Judge.

(Argued April 6, 1970. Decided June 2, 1970.)

Before BOREMAN, BRYAN and CRAVEN, Circuit Judges.

Daniel J. Smith for Appellant, and William W. Koontz (Ronald K. Ingoe, and Boothe, Dudley, Koontz, Blankingship & Stump on brief) for Appellees.

PER CURIAM:

Richard I. Krodel appeals from a judgment of the district court in favor of the defendants and denying appellant's motion for a new trial.

Krodel seeks damages allegedly suffered by reason of fraud and deceit of the defendants in inducing him to purchase and operate under a franchise from Magic Fingers, Inc., a manufacturer and distributor of a bed vibrator with attached vending device. The case was tried by the district court without a jury, and at the conclusion of Krodel's evidence the court found against Krodel and in favor of the defendants on the ground that Krodel had failed to carry his burden of proof of the alleged fraud and deceit. The court announced from the bench its findings of fact and conclusions of law.

We have carefully considered the record, briefs and oral argument and find no reversible error.

Affirmed.

[Page 41 from Transcript to Hearing on Motion for Retrial, CA 4909A, December 10, 1971]

[41] your witness?

MR. KRODEL: You questioned one of my witnesses, yes, sir.

THE COURT: That is interesting.

MR. KRODEL: At the Washington Golf and Country—

THE COURT: I say that is mighty interesting that I questioned your witness.

MR. KRODEL: You questioned him at the Washington Golf and Country Club on the Saturday evening following the 19th of October. He said to me—

THE COURT: He did?

MR. KRODEL: Yes, sir.

THE COURT: If you have any charges to make against me you just bring them in here.

MR. KRODEL: I am not making any charge.

THE COURT: You file any charges you want to, Mr. Krodel. I never questioned one of your witnesses in my life.

But be that as it may, if you are talking now about the second trial—

MR. KRODEL: The second trial, yes, sir.

THE COURT: The first you were talking about

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AGREEMENT

MAGIC FINGERS, INC.

Route 17, Rochelle Park, New Jersey

THIS AGREEMENT made in the State of New Jersey, this 10 day of June, 1965, by and between MAGIC FINGERS, INC., a corporation organized and existing under and by virtue of the laws of the State of Delaware, with principal offices at Route 17, Rochelle Park, New Jersey (hereinafter referred to as the "Company"), and Richard I. Krodel, residing at

Residence: 304 N Street, S.W., Washington, D.C.

Mailing: 8235 Southwest Station, Washington, D.C. 20024

Shipping: Will advise

(Telephone number
(202) 546-1710 (Home)
(202) OX 8-1889 (Office))

(hereinafter referred to as the "Dealer"),

WITNESSETH:

WHEREAS, the Company is the sole owner of the patent rights and registered trademark with respect to a massaging assembly known as "MAGIC FINGERS," (hereinafter referred to as the "Units");

WHEREAS, the Dealer desires, upon the terms and conditions hereinafter set forth to enter into the business of selling and distributing the Units.

NOW, THEREFORE, in consideration of the promises and the mutual covenants hereinafter set forth, the parties hereto do hereby Agree as follows:

1) The Company hereby grants to the Dealer the right to purchase from the Company, at such prices as may prevail at the time of receipt of the Dealer's order, Units bearing the Magic Fingers trademark, and to distribute such Units only under such trademark.

Hotels, Motels and Home Sales (Nonexclusive)

2) So long as the Dealer is engaged pursuant to this agreement, the Dealer shall use the name "MAGIC FINGERS of MARVA" but the Dealer shall not incorporate under the name "MAGIC FINGERS" or any translation or variation thereof. The Dealer shall never interfere with or attempt to prohibit the use of the name "MAGIC FINGERS" by the Company, or any other dealer appointed by the Company.

3) The Company shall supply to the Dealer, at the Company's own cost and expense, the following materials and services: Complete sales and merchandising aids, complete sales and installation training, installation tool kit, six desk sets, six home units, six display bubbles.

4) The Dealer has paid to the Company the sum of $4,000.00 upon the execution hereof, in full payment for an initial purchase of 92 combo units & 6 home units. Units and related sales aids, as described in a Purchase Order executed simultaneously herewith.

5) So long as the Dealer is engaged pursuant to this agreement, the Dealer shall:

(a) Offer the units for sale at such prices or rates as shall be suggested by the Company and reflected in sales manuals, cost sheets, or other rules and regulations, which may from time to time be issued by the Company.

(b) Obtain from each location in which the Units are installed, an executed Installation Agreement, on a form supplied by the Company, and deliver a copy of such agreement to the Company.

(c) Give notice to the Company of any advertising or sales literature to be used in connection with the distribution of the Units, and obtain from the Company consent in writing for the use of such advertising or sales literature prior to its use.

(d) Report to the Company each sale of the Units, giving the commercial location, name and address, and quantity of Units sold.

(e) Service and maintain all of the Units sold or placed by the Dealer.

(f) Devote to the sale, distribution, placement and promotion of the Units, such time, effort and interest as may in the circumstances be required to effectively distribute the Units.

(g) Refrain from advertising, handling, selling, leasing, renting, manufacturing, distributing or otherwise dealing, in any goods or merchandise which may be in competition with the Units.

(h) Comply with any and all reasonable rules and regulations promulgated and issued by the Company.

(i) Make no claims of medical or therapeutic value for the Units in connection with the distribution of them.

(6) This agreement may be terminated by the Company upon thirty (30) days' notice in writing to the Dealer upon any of the following events or conditions:

(a) The death, incompetence, insolvency, bankruptcy, or assignment for the benefit of creditors, of the Dealer.

(b) The failure by the Dealer to comply with any of the terms and conditions of this agreement.

(c) Conduct of the Dealer of a character which reflects discredit or dishonor upon the Company.

7) Unless terminated as heretofore provided, this agreement shall continue in full force and effect for twelve (12) months from the date hereof, and thereafter shall be automatically extended from year to year, unless at least thirty (30) days prior to the expiration of such term or any extension thereof, notice of intention to finally terminate shall be given by one party to the other. The rights of the Dealer hereunder shall not be terminated without the consent of the Dealer so long as the Dealer is complying in full with all the terms and conditions of this agreement.

8) Upon the termination of this agreement for any cause, the Dealer will immediately discontinue all use of the tradenames, trademarks, signs and forms of advertising, or other indicia of operation, as a Magic Fingers dealer. The Dealer shall forthwith pay to the Company and all sums due to the Company as herein provided, and shall return to the Company any and all sales manuals, catalogues, price lists, or other sales materials furnished by the Company to the Dealer. The Dealer shall forthwith take whatever action shall be necessary to effect the withdrawal from registration under any applicable law or statute of the name "MAGIC FINGERS of MARVA," as a name under which the Dealer is doing business, and hereby appoints the Company its agent for the purpose of executing and filing any forms, documents, or applications necessary to effect such withdrawal from registration.

9) The Dealer acknowledges that the business of distributing the Units is unique in its character, and is a business about which the Dealer had insubstantial knowledge prior to becoming a Magic Fingers dealer. The Dealer further acknowledges that, in connection with its activities as a Magic Fingers dealer, certain trade secrets and methods of operation of the Company will be disclosed to it, which information would not otherwise have been

available to the Dealer. In consideration of the Company's agreement to make such information available to the Dealer, the Dealer agrees that, for a period of three (3) years after the termination of this agreement, the Dealer shall not directly or indirectly engage, within five hundred (500) miles of the circumstances of the Dealer's Residence Address, in any business which shall be in competition with the business of the Company.

10) If, as a result of the failure by the Dealer to comply with any of the terms and conditions of this agreement, it becomes necessary for the Company to initiate legal proceedings for the purpose of effecting such compliance, the Dealer shall be liable to the Company for such reasonable attorneys' fees as may be incurred, together with all other costs, expenses and disbursements, which may be expended in the prosecution of such proceedings.

11) The Company guarantees its Units against defective material and workmanship, its obligation under such guarantee being limited to replacing at its factories any equipment or component parts thereof which shall, within twelve (12) months after date of sale to the Dealer, be returned to its factories, transportation charges prepaid. Unauthorized repairs will void the guarantee. Such guarantee is in lieu of all other warranties, express or implied.

12) Nothing contained herein shall be construed to create the relationship of employer-employee, or principal agent, between the Company and the Dealer. The Dealer shall at all times be deemed an independent contractor dealing with the Company with all the rights, duties and obligations pertaining thereto. Any expenses or liabilities occasioned by the Dealer of whatever character arising in the operation of Dealer's business, or any way connected therewith, shall be the sole, separate responsibility of the Dealer, and the Company shall have no direct or indirect responsibility therefor.

13) This agreement shall be binding upon the Dealer, its heirs, executors, administrators, successors or assigns, but no assignment hereof shall be upon the Company without the prior consent in writing of the Company.

14) In the event any clause of this agreement is adjudicated invalid, such adjudication shall not affect the validity of the entire agreement but shall be limited only to that clause.

15) This agreement embodies the entire agreement between the parties, and may not be modified except by an agreement in writing signed by the parties hereto.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals, the day and year first above written.

MAGIC FINGERS, INC.

By .....
[DEALER]

MAGIC FINGERS OF MARVA

By .....

Richard I. Krodel

.....

INSTANCES OF GROSS NEGLIGENCE BY PLAINTIFF'S ATTORNEY IN CA 4207

KRODEL *vs.* HOUGHTALING, *et al.*

1. Refused to amend pleadings to incorporate other causes of action occurring subsequent to service of process but prior to trial, or to petition court for temporary injunction restraining defendant and his agent from interfering with other locations of plaintiff while this case was before the court.

2. Based his trial of case wholly on theory of proving defendant's fraud, citing *37 Am Jur 2d 329* and totally ignoring the law on fraud requiring plaintiff to carry burden of proof. Court ruled this was true of sales contracts but not of business contracts. Plaintiff's attorney did not object to ruling and failed to cite *37 Am Jur 2d 395* which does apply to business contracts, which he failed to research.

3. Did not review substance of case with plaintiff until two nights before trial and then only sketchily. He imposed requirements for documentation which kept plaintiff up to early morning of trial, with result that plaintiff was not alert and in no mental condition to undergo cross examination, especially by a trial judge who, plaintiff had discovered, has a community-wide reputation as a former prosecuting attorney for "trying" a case before him and for excessively interfering with counsel.

4. Failed to master facts and in one instance stated key date in error and harmful to plaintiff's cause.

5. Based on his theory for trial of case, refused to examine with plaintiff false statements made on deposition by defendant witnesses. Defendant's out-of-state attorney used these statements at trial, some out of context. Plain-

tiff's attorney, he said, depended on judge to read the depositions, which the judge promised to do but did not.

6. Without consultation with plaintiff, released several of plaintiff's many documents to defendant's out-of-state attorney, some with notes requiring explanation and for which plaintiff was not prepared to respond to when defendant's out-of-state attorney introduced them at trial.

7. Failed to require defendant to furnish documents which defendant's out-of-state attorney had promised on deposition, especially after defendant's out-of-state attorney wrote letter demanding listed documents for his clients, which were handed over, except for one document subjected by plaintiff to condition which defendant made no good-faith attempt to meet.

8. Accepted offer by defendant's out-of-state attorney to obtain tickets for Broadway play "Mimi" and attended evening there with his wife.

9. Frequently consulted defendant's out-of-state attorney and apparently related confidences such as his strategy for trial.

10. Waited until last week preceding trial to subpoena witnesses. This created serious problems and resulted in failure to subpoena a key witness who had moved.

11. Interposed no objection to defendant's long distance telephone calls to plaintiff's witnesses, which one witness related to plaintiff.

12. Did not examine plaintiff on attempts to get out of business or to get a job. Referred to plaintiff's age (52), merely inferring this as handicap for reemployment. Actually, plaintiff made over 300 job inquiries and was interviewed on 36 jobs before being re-employed by the federal government on December 2, 1968.

13. Did not prepare plaintiff for examination of plaintiff's conduct during period following discovery of fraud and initiation of adverse actions against defendant.

14. Did not present a coherent, chronological development of events at trial, but jumped back and forth, confusing judge. Judge compounded confusion by his "prosecution", stating that ". . . this case has probably got me more confused than any of them I have had in 8 years in this Court . . ."

15. At trial, did not examine plaintiff on cessation of graduate studies at American University and on efforts spent on work on franchise business, although documented by deposition.

16. Refused to examine plaintiff on professional qualifications.

17. Refused to establish franchise developments ("I'm not going to educate the judge."), as basis for alleging fiduciary relationship.

18. Refused to examine plaintiff on details of deficiencies in training and on defects of equipment, even though plaintiff provided him extensive listing of latter.